The Honorable Judges Wilkins, Williams, & Motz Acting

FILED
June 17, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2438
CA-00-514-2

CHRISTOPHER LEE JOHNSON; VERONICA MOODY JOHNSON,

Defendants & Third-Party Plaintiffs – Appellants

v.

EMERALD GREENS PROPERTY OWNERS ASSOCIATION BOARD OF DIRECTORS, jointly and severally and in their individual capacity, personally (immediate past and present members); MIKE LEWIS, President; RICHARD MATTHEWS, CRAIG POPPIN; MARK WILLIAMS; PETER NICHOLS; KATHY THOMAS; ANNE DEL CORE; DAVID THOMPSON,

Third Party Defendants – Appellees

v.

EMERALD GREENS PROPERTY OWNERS ASSOCIATION,

Plaintiff – Appellee

- -

MARY E. COX,

Movant

On Petition for Rehearing and Rehearing En Banc

The Appellants' petition for rehearing and rehearing en banc and motion to correct record was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc and the motion to correct the record on appeal are denied.

For the Court

/S/ Patricia S. Connor

CLERK

The Honorable Judges Wilkins, Williams, & Motz Acting

Decided May 14, 2002

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2438

CHRISTOPHER LEE JOHNSON;
VERONICA MOODY JOHNSON,
Defendants & Third-Party
Plaintiffs – Appellants,
versus
EMERALD GREENS PROPERTY
OWNERS ASSOCIATION BOARD
OF DIRECTORS, jointly and severally
And in their individual capacity, personally
(immediate past and present members);
MIKE LEWIS, President; RICHARD
MATTHEWS, CRAIG POPPIN; MARK
WILLIAMS; PETER NICHOLS; KATHY
THOMAS; ANNE DEL CORE; DAVID
THOMPSON,
Third-Party Defendants –
Appellees,
versus
EMERALD GREENS PROPERTY OWNERS
ASSOCIATION,
Plaintiff – Appellee,
MARY E. COX,
Movant.

Appeal from the United States District Court For the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge.
(CA-00-514-2)

Submitted: April 18, 2002

Decided: May 14, 2002

PER CURIAM

Christopher Lee Johnson and Veronica Moody Johnson appeal the district court's order granting summary judgment to the Emerald Greens Property Owners Association on the Johnsons' cross-claims, granting summary judgment to the Board of Directors of the Emerald Greens Property Owners Association and to its individual members, denying the Johnsons' motion for summary judgment, and remanding the remaining claims to state court. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Johnson v. Emerald Greens Prop. Owners Ass'n, No. CA-00-514-2 (E.D. Va.

Filed Oct. 25, 2001 & entered Oct. 26, 2001; Oct. 30, 2001). We deny the Johnsons' motions to stay review of the case and to consolidate the case with No. 02-1371, Johnson v. City of Chesapeake. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would no aid the decisional process.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

EMERALD GREENS PROPERTY OWNERS ASSOCIATION,
Plaintiff,
v. **Civ. Action No. 2:00cv514**
CHRISTOPHER LEE JOHNSON and VERONICA MOODY JOHNSON,
Defendants and Third-Party Plaintiffs,
v.
THE BOARD OF DIRECTORS OF THE EMERALD GREENS PROPERTY OWNERS ASSOCIATION, et al.,
Third-Party Defendants

ORDER AND OPINION

On October 16, 2001, the Court heard oral argument with respect to ten pending motions in the above captioned case, including cross-motions for summary judgment. At the conclusion of the oral argument, the Court **DENIED** Third-Party Defendants' Motion to continue and **GRANTED** the Third-Party Defendants' Motion to Dismiss Anne Del Core and David Thompson from the case. The remaining motions were taken under

advisement. For the reasons set forth below, the Court makes the following rulings: Plaintiff's Motion for Summary Judgment with respect to Defendants' cross claims is **GRANTED**; Third-Party Defendants' Motion for Summary Judgment is **GRANTED**; and Defendants/Third-Party Plaintiffs' Motion for Summary Judgment against Plaintiff's claims is **DENIED**. The remainder of the pending motions[1] are rendered moot by these decisions and need not be addressed. Finally, the remaining claims are **REMANDED** to Chesapeake Circuit Court, pursuant to Title 28, United States Code,

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[1] These motions include (1) Defendants' Motion to Withdraw their Motions to Withdraw Specific Claims Against the Plaintiff and Third-Party Defendants; (2) Plaintiff's Objection to the Defendants' Motion to Withdraw their Motion to Withdraw Specific Claims filed against Emerald Greens Property Owners Association; (3) Third-Party Defendants' Objection to the Defendants' Motion to Withdraw Joint Motion to Withdraw Specific Claims, and in the Alternative, Motion to Enforce Agreement; (4) Plaintiff's Motion to Exclude Expert Lewis Bridges, Jr., and Expert Report; (5) Third-Party Defendants' Motion to Exclude Expert Testimony; and (6) Defendants' motion Seeking an Order from the Court Clarifying "Who the third-party defendant is" (sic).

Section 1447(c), as this Court lacks subject matter jurisdiction.

I. Factual and Procedural Background

In October 1998, Emerald Greens Property Owners Association ("Plaintiff") filed a Bill of Complaint to Enforce Restrictive Covenants against Mr. and Mrs. Johnson ("Defendants") in the Circuit Court for the City of Chesapeake. This complaint was amended in August 1999. The Plaintiff alleges that the Defendants violated the Declaration of Covenants, Conditions, Restrictions and Easements of the Emerald Greens Property Owners Association ("Declaration of Covenants") by constructing a brick fence/wall on their property. On June 14, 2000, the Defendants filed an Answer to Amended Bill of Complaint and two Cross Bills in state court. The first Cross Bill was directed towards the Plaintiff. The second Cross Bill was directed towards the Board of Directors of the

Emerald Greens Property Owners Association and most of the Board's individual members (collectively, the "Third-Party Defendants"). The Defendants' Cross Bills allege that the Plaintiff and the Third-Party Defendants seek to selectively enforce the covenants in violation of the Fair Housing Act of 1968, 42 U.S.C. 1981 and 1982, the Virginia Property Owners' Association Act, and the Declaration of Covenants. On July 11, 2000, the case was removed to federal court pursuant to 28 U.S.C. 1441 and 1446. Defendants subsequently amended their complaint and included the following eleven counts:

Count I - Violation of 42 U.S.C. 1985

Count II - Unlawful Disparate Treatment under 42 U.S.C. 3604 (Fair Housing Act

Count III - Unlawful Disparate Impact under 42 U.S.C. 3604

Count IV - Unlawful Interference under 42 U.S.C 3617

Count V - Unlawful Intimidation under 42

U.S.C. 3617

Count VI - Breach of Fiduciary Duty under 42 U.S.C. 3604

Count VII - Violation of the Civil Rights Act of 1866

Count VIII - Violation of 42 U.S.C. 1981

Count IX - Violation of 42 U.S.C. 1982

Count X - Violation of the Equal Protection And Due Process Clauses of the Fourteenth Amendment

Count XI - Breach of Contract/Breach of Covenants

There have been numerous motions filed and hearings conducted in this case over the past year and a half. During the October 16, 2001 hearing, Defendants withdrew their claims under Counts III, IV, and V, and therefore the Court will not address these claims.

II. Discussion

A. Issues Resolved at Oral Argument

At the conclusion of oral argument in this matter, the Court made two rulings from the

bench. First, the Court **DENIED** Third-Party Defendants' Motion for Continuance. Third-Party Defendants requested a continuance of the trial date, which is scheduled for November 28, 2001, because lead counsel was called into active duty on September 28, 2001. However, Third-Party Defendants are represented by a law firm with over 200 attorneys and given that at the time the motion was filed there were still two months to prepare for trial, the Court did not believe such a continuance was necessary.

Second, the Court **GRANTED** Third-Party Defendants' Motion to Dismiss two individual members of the Board of Directors, Anne Del Core and David Thompson, who were not Directors at the time the decision to pursue legal action against the Defendants for violating the Association's covenants was voted on. The Fourth Circuit has found that federal civil rights statutes neither enlarge nor diminish the liability of directors under general corporation law for tortuous acts performed nominally by the

corporation. See Tillman v. Wheaton-Haven Recreation Associat., Inc., 517 F.2d 1141, 1144 (4th Cir. 1975). If a director does not personally participate in the corporation's tort, general corporation law does not subject him to liability by virtue of his office. Id. A director is only liable for the torts if he actually votes for the commission of the tort or voluntarily and intentionally causes the corporation to commit the tort. Id. Since neither Ms. Del Core nor Mr. Thompson participated in the vote to initiate legal action against the Defendants, nor did they vote to continue such legal action, they cannot be held liable for any alleged discrimination that occurred.

B. Summary Judgment Standard

Summary Judgment is appropriate when it is apparent from the entire record, viewed in light most favorable to the non-moving party, that there are no genuine disputes of material fact.

See, e.g. Clark v. Alexander, 85 F.3d 146, 150 (4th Cir. 1996); Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S.Ct. 2548, 2552-53 (1986); United States v. Diebold, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962). When a court declines to grant summary judgment, sufficient evidence must exist favoring the nonmoving party which would allow a reasonable jury to return a verdict for that party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511 (1986).

A property supported motion for summary judgment may not be defeated by "the mere existence of some alleged factual dispute between the parties." Id. At 247-48. The requirement is that there are *no* genuine issues of material fact. Id. Entry of summary judgment is mandated "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at

322. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e); see also, Dixon v. State Farm Fire & Cas. Ins. Co., 926 F. Supp. 548, 549 (E.D. Va. 1996).

C. Pro se Litigant Standard

As pro se litigants, the Defendants' pleadings are held to less stringent standards than formal pleadings drafted by lawyers. See Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596 (1972). This also comports with Rule 8(f) of the Federal Rules of Civil Procedure, which provides that "[a]ll pleadings shall be so construed as to do substantial justice." Fed. R.

Civ. P. 8(f). This principle is even more important in the civil rights arena. When a civil rights plaintiff appears pro se, there is a "greater responsibility upon the district court to insure that constitutional deprivations are redressed and that justice is done." Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978). However, the court is not expected to assume the role of advocate for the pro se plaintiff. Id. The "[p]rinciples requiring generous construction of pro se [pleadings] are not ... without limits." Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

D. Defendants' Discrimination Claims

1. Content of Summary Judgment Pleadings

In this case, Plaintiff and Third-Party Defendants filed separate motions for summary judgment against the Defendants and provided the Defendants with the proper Roseboro notice. See Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (holding that before a court may grant

summary judgment against a pro se plaintiff, it is obliged to notify the plaintiff of the requirements of the summary judgment rule). Defendants responded and their pleadings were viewed with a lenient eye. The Court granted numerous extensions of time so that Defendants could respond to various pleadings by their adversaries. Additionally, the Court permitted Defendants to amend their pleadings and submit supplemental information on many occasions, even after deadlines had passed. However, the "[p]rinciples requiring generous construction of pro se [pleadings] are not ... without limits. Beaudett, 775 F.2d at 1278. Defendants are required to respond to an adversary's motion for summary judgment with the proper supporting evidence. Here, Defendants were given the proper Roseboro notice, advising them of their rights under the summary judgment rule to file opposing affidavits to defeat their adversary's motion. Yet despite all of this, Defendants failed to properly

defend the Plaintiff's and Third-Party Defendants' Motions for Summary Judgment. Defendants did not file any affidavits or sworn statements, produce deposition testimony, or cite to any portion of the record to substantiate their discrimination claims. As a result, Plaintiff's Motion for Summary Judgment against the Defendants' cross claims is **GRANTED**, and Third-Party Defendants' Motion for Summary Judgment is **GRANTED**.

In addition, the Defendants filed a Motion for Summary Judgment against the Plaintiff's action seeking enforcement of the covenants.

As explained above a party must show that there are no genuine issues of fact in order for a court to grant summary judgment in his favor. Here, the Defendants have failed to support such a motion with any evidence or sworn statements to meet this burden. Therefore, Defendants' Motion for Summary Judgment is **DENIED**.

2. Merits of Defendants' Discrimination Claims

Even if Defendants had filed the proper evidence to defeat their adversaries' motions for summary judgment, this Court would still grant the Plaintiff's and Third-Party Defendants' motions for the reasons set forth below.

a. Count I – Violation of 42 U.S.C. 1985

In Count One, Defendants allege that the Third-Party Defendants conspired to deprive them of their Constitutional rights and their rights under the Fair Housing Act in violation of Title 42, United States Code, Section 1985. However, throughout this litigation, the Defendants have asserted that "[a]t all times relevant hereto, the Board was acting ... (iii) within their authority as agents or apparent agents of the Association." Am. Compl., Dkt. 56 at Paragraph 11. As such, the Board of Directors and the Association are a single entity and are therefore immune from a charge of

conspiracy under 42 U.S.C. 1985 based on the intracorporate immunity doctrine. The Fourth Circuit has held that

> [i]t is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Buschi v. Kirven, 775 F.2d 1240, 1251 (4th Cir. 1985) (quoting Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952)). This immunity is not destroyed because the agents are sued individually. Buschi, 775 F.2d at 1252 (quoting Cole v. University of Hartford, 391 F.Supp. 888, 893 (D. Conn. 1975) ("simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation...")). Therefore, since the Association cannot conspire with itself,

Defendants have failed to state a cause of action under 42 U.S.C. 1985, and thus, summary judgment is **GRANTED** withy respect to Count I.

b. Counts II – Unlawful Disparate Treatment under 42 U.S.C. 3604

In Count II, Defendants claim Plaintiff and Third-Party Defendants treated them differently with respect to the application of the covenants because of their race, and thus, violated Title 42, United State Code, Section 3604 (the Fair Housing Act). Specifically, Defendants allege that Plaintiff and Third-Party Defendants refused to take action against other homeowners who were in violation of the Association's covenants, whereas they did institute legal action against the Defendants for such violations because they are African-American. Plaintiff and Third-Party Defendants deny that any decisions made by the Association were based on the Defendants' race. Instead, they claim their actions were motivated by the admitted intentional violation by the Defendants of the

covenants and restrictions by constructing a nonconforming fence.

Section 3604 of the Fair Housing Act prohibits engaging in the following conduct on the basis of race, color, religion, sex, familiar status, or national origin: (a) refusing to sell or rent, negotiate for the sale or rental, or otherwise make unavailable or deny a dwelling; (b) to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling; (c) to make, print, or publish a notice, statement or advertisement with respect to the sale or rental of a dwelling which indicates a preference based upon a prohibited factor; (d) to represent that a dwelling is not available for sale or rental to a member of the protected class; or (e) to induce or attempt for profit any person to sell or rent any dwelling. 42 U.S.C. 3604 (1994). The Fair Housing Act provides no cause of action for disparate treatment which does not involve the sale or rental of property. Id. There is no evidence in this case involving the sale or rental

of real property – the sole issue is the construction of a fence on property which the Defendants already own. As such, a claim under 42 U.S.C. 3604 cannot stand as a matter of law, and Plaintiff's and Third-Party Defendants' motions for summary judgment are **GRANTED** with respect to Count II.

c. Count III – Unlawful Disparate Impact under 42 U.S.C. 3604; Count IV – Unlawful Interference under 42 U.S.C. 3617; and Count V - Unlawful Intimidation under 42 U.S.C. 3617

As stated above, Defendants withdrew these claims during oral argument. The Court therefore will not address the merits of these claims.

d. Count VI – Breach of Fiduciary Duty under 42 U.S.C. 3604

Defendants contend that Third-Party Defendants failed to operate the Association in the best interests of the Defendants and the other Association members by instituting this

lawsuit against the Defendants to enforce the Covenants in a discriminatory manner. Defendants claim that Third-Party Defendants violated their fiduciary duties to execute the covenants in a reasonably fair and equitable manner and to avoid unequal treatment expressly predicated on race, ethnicity, religion or sex, as set forth in Title 42 United States Code, Sections 1981, 1982 and the Civil Rights Act of 1866. Additionally, they maintain that Third-Party Defendants failed to obtain fair housing training and to abide by the federal fair housing laws. See Am. Compl., Dkt. 56 at Paragraph 99.

However, as noted by Third-Party Defendants in their motion for summary judgment, Defendants have admitted that the Third-Party Defendants did not violate the covenants nor selectively enforced them, citing Mr. Johnsons' answers to interrogatories and Mrs. Johnsons' Brief in Response to Third-Party Defendants' Motion for Sanctions and to Modify

Pretrial Order. See Third-Party Defs'. Mot. For Summ. J., Dkt. 144, Exs. 16 and 17. Third-Party Defendants also point out that Defendants have admitted that Third-Party Defendants did not discriminate against them, again citing Mr. Johnsons' answers to interrogatories and Mrs. Johnsons' deposition testimony. See Third-Party Defs'. Mot. For Summ. J., Dkt. 144, Exs. 16 and 17 at p. 97. Rather, the only reason for Defendants' claim Third-Party Defendants violated their fiduciary duty was by not acting in the best interests of the Association. See Mrs. Johnsons' dep., Dkt. 144, Ex. 7 at pp. 98-99.

The fiduciary duty upon which Defendants rely is that duty owed by the Board of Directors to the Association, not to the Defendants individually. Under Virginia law, an action for breach of fiduciary duty owed to a corporation by a director cannot be maintained by a shareholder on an individual basis and must be brought derivatively. See Simmons v. Miller, 261 Va. 561, 573, 544 S.E.2d 666, 674

(2001). Accordingly, an individual action against directors of a corporation for breach of their fiduciary duty to the corporation is inappropriate. Id. Therefore, the Court **GRANTS** summary judgment in favor of Plaintiff and Third-Party Defendants as to Count VI.

e. Count VII, VIII and IX – Violation of Civil Rights Act of 1866, 42 U.S.C. 1981 and 1982

The Defendants claim that Plaintiff and Third-Party Defendants have (1) violated their rights under the Civil Rights Act of 1866 in that the Board Members enforced the Association's covenants unequally; (2) acted to deny them the same right to make and enforce contracts as enjoyed by white citizens of the United States in violation of 42 U.S.C. 1981; and (3) acted to deny their rights to inherit, purchase, lease, hold, sell and convey real and personal property in violation of 42 U.S.C. 1982.

Discriminatory intent is required to demonstrate a violation of the Civil Rights Act of 1866, 1981

and 1982. See, e.g., General Building Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 389-90, 102 S.Ct. 3141, 3149 (1982) (holding that the Civil Rights Act of 1866 and its modern equivalent 1981 require proof of discriminatory intent); Save Our Cemeteries, Inc. v. Archdiocese of New Orleans, Inc., 568 F.2d 1074, 1078 (5th Cir. 1978) holding that 1981 and 1982 require evidence of racially discriminatory animus). To prove discriminatory intent, Defendants rely on the comments of Mike Lewis, President of the Association and an individual Third-Party Defendant, to demonstrate discriminatory intent. However, in Mr. Johnsons' deposition, he stated that Mr. Lewis, as well as the other members of the Board, have not made any statements that demonstrate racial animus or expressed a dislike for African-American people. See Third-Party Defs.' Mot. For Summ. J., Dkt. 144, Ex. 18 at p. 11. Mrs. Johnson claims that Mr. Lewis made a number of comments *to her* which she

claims is evidence of discriminatory intent. While Mr. Lewis disputes the characterization and accuracy of these comments, in a summary judgment motion the non-moving party's evidence must be viewed in its most favorable light. However, Defendants have failed to produce *any* evidence of discriminatory intent in the Plaintiff's and Third-Party Defendants' decision to take legal action against the Defendants to enforce the Association's covenants. Nor have the Defendants refuted the affidavits submitted by Third-Party Defendants stating that they did not discriminate against the Defendants. See Third-Party Defs'. Mot. for Summ. J., Dkt. 144, Exs. 1, 14, and 21. Therefore, the Court **GRANTS** summary judgment for the Plaintiff and Third-Party Defendants as to Counts VII, VIII and IX.

f. Count X – Violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment

The parties have not briefed arguments on this count. Therefore, the Court may deem this count waived. See Remington Arms Co., Inv. v. Modern Muzzleloading, Inc., 1999 WL 281341, *3, n.5 (M.D.N.C. 1999) (unpublished) (holding that because defendant failed to raise arguments in its motion for summary judgment or response to plaintiff's summary judgment brief, the court shall deem these objections to have been waived). However, even if not waived, this claim must fail because a violation of the Fourteenth Amendment requires state action. See, e.g., United States v. Morrison, 529 U.S. 598, 621, 120 S.Ct. 1740, 1756 (2000) ("[T]he Fourteenth Amendment, by its very terms, prohibits only state action."); Shelley v. Kraemer, 334 U.S. 1, 13, 68 S.Ct. 836, 842 (1948) (holding that the "Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful.") There has been no state action in this case and therefore, there can be no Fourteenth Amendment violation. Thus, the

Court **GRANTS** summary judgment with respect to Count X.

g. Count XI – Breach Contract/ Breach of Covenants

In this final count, Defendants allege that Plaintiff and Third-Party Defendants have breached their contract and covenants with Defendants as members of the Association. This claim appears to be rooted in the allegation that the Association has selectively enforced its covenants against the Johnsons but not against others in the community. However, this argument must fail for three reasons. First, the Defendants have expressly admitted that the Third-Party Defendants did not breach the terms of the Association's covenants. See Third-Party Defs'. Mot. For Summ. J., Dkt. 144, Exs. 16, 17. Second, the Defendants have failed to identify any provision of the Association's covenants which the plaintiff and Third-Party Defendants have violated. And third, the Third-Party Defendants cannot be held individually liable for

any breach of the Association's covenants. The Fourth Circuit and the Virginia Supreme Court have held that an agent cannot be held personally liable to a third party for a breach of a contract between the principal and a third party, unless the agent is individually held responsible by the terms of the contract or the agent acts outside the scope of his duties in forming the contract. See Markdata, Inc. v. Seaside Properties, Inc., 861 F.2d 265, 1988 WL 105299, *2 (4th Cir. 1988) (unpublished); House v. Kirby, 233 Va. 197, 199 355 S.E.2d 303, 305 n.1 (1988). Furthermore, with respect to the Plaintiff, since a corporation acts through its Board of Directors, if the Board of Directors did not violate any covenants of the Association, then the Plaintiff-Association could not have violated any covenants. Therefore, based on these reasons, the Court **GRANTS** Plaintiff's and Third-Party Defendants' motions for summary judgment as to Count XI.

E. Remand to State Court

The only remaining claims before this Court are contained in the plaintiff's initial lawsuit against Defendants to enforce the restrictive covenants and for attorney's fees.[2] These claims represent wholly state law issues, devoid of any questions of federal law. Under the Federal Rules of Civil Procedure, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded." 28 U.S.C. 1447 (c) (1989) (emphasis added); see also In re Conklin, 946 F.2d 306, 324 (4th Cir. 1991) (quoting Carnegie-Mellon University v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619 (1988)) ("remand was proper ... to the effect that the district court should refrain from deciding the pendent 'state claims when state issues substantially predominate...'"). Since the Plaintiff's lawsuit against Defendants is comprised wholly of state

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[2] Plaintiff's claim for attorney's fees arises under the Virginia Property Owners' Association Act. Va. Code. Ann. 55-515 (Michie 1995).

law issues, the case is **REMANDED** to Chesapeake Circuit Court for appropriate resolution. Defendants are **ADVISED** that the remand of a case removed to federal court pursuant to 1443 ("civil rights case" may be reviewed on appeal. 28 U.S.C. 1447(d).

III. Conclusion

For the reasons stated and those listed above, the Court **DENIES** Third-Party Defendants' Motion to Continue; **GRANTS** the Third-Party Defendants' Motion to Dismiss Anne Del Core and David Thompson from the case; **GRANTS** Plaintiff's Motion for Summary Judgment as to the Defendants' cross claims; **GRANTS** Third-Party Defendants' Motion for Summary Judgment; and **DENIES** Defendants' Motion for Summary Judgment against Plaintiff's claims. The remainder of the pending motions are rendered moot by these decisions. Finally, the remaining claims are **REMANDED** to Chesapeake Circuit Court, pursuant to 28 U.S.C. 1447(c).

The Clerk is **REQUESTED** to send copies of this Order to all counsel of record and to pro se Defendants/Third-Party Plaintiffs, Veronica M. Johnson and Christopher L. Johnson.

Mr. and Mrs. Johnson are **ADVISED** that they may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

IT IS SO ORDERED.

Norfolk, Virginia
October 25, 2001

/s/ Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

EMERALD GREENS PROEPRTY OWNERS ASSOCIATION,
Plaintiff,

v. **Civ. A. No. 2:00cv514**

CHRISTOPHER LEE JOHNSON and VERONICA MOODY JOHNSON,
Defendants and Third-Party Plaintiffs,

v.

THE BOARD OF DIRECTORS OF THE EMERALD GREENS PROPERTY OWNERS ASSOCIATION, *et al.*,
Third-Party Defendants

AMENDED ORDER

On October 25, 2001, this Court entered an Order and Opinion denying Third-Party Defendants' Motion to Continue; granting the Third-Party Defendants' Motion to Dismiss Anne Del Core and David Thompson from the case; granting Plaintiff's Motion for Summary

Judgment as to the Defendants' cross claims; granting Third-Party Defendants' Motion for Summary Judgment; denying Defendants' Motion for Summary Judgment against Plaintiff's claims; and remanding the remaining claims to Chesapeake Circuit Court, pursuant to 28 U.S.C. 1447(c). However, on October 16, 2001, Defendants filed a number of motions with this Court, specifically a Motion for Jury View and three Motions in Limine to Exclude Evidence regarding (1) any survey prepared by Plaintiff, (2) failure of the Defendants to cover the certain rear sections of their fence with an acceptable finish, and (3) any agreements with regard to waivers of the covenants by the developer. These motions were not addressed in the October 25, 2001 Order and Opinion. Therefore, in order to resolve all pending motions, this Court rules that based on its October 25, 2001 Order and Opinion, these motions are now moot.

The Clerk is **REQUESTED** to send copies of this Order to all counsel of record and to pro se Defendants/Third-Party Plaintiffs, Veronica M. Johnson and Christopher L. Johnson.

As noted in the October 25, 2001 Order and Opinion, Mr. and Mrs. Johnson are **ADVISED** that they may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice must be received by the Clerk within thirty (30) days from the date of this order.

IT IS SO ORDERED.

/s/ Jerome B. Friedman
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
October 30, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

EMERALD GREENS PROPERTY OWNERS ASSOCIATION,	)	
Plaintiff,	)	Civil Action
v.	)	No.
CHRISTOPHER L. JOHNSON, et al.,	)	2:00cv514
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

(Motions)

Norfolk, Virginia

October 16, 2001

BEFORE:

THE HONORABLE JEROME B. FRIEDMAN
United States District Judge

Appearances:

INMAN & STRICKLER
By: BARRY R. KOCH,
Counsel for the Plaintiff

WILLIAMS, MULLEN, CLARK & DOBBINS
By: DAVID C. BURTON
ALEXANDER W. STILES
Counsel for Third-Party Defendants

VERONICA M. JOHNSON, Pro Se
Defendant

SUSANNE V. ASH,
OFFICIAL COURT REPORTER

[page 2]

(Proceedings commenced at 2:00 p.m.)

THE DEPUTY CLERK: In case number 2:00cv514. Emerald Greens Property Owners Association versus Christopher L. Johnson, et al.

Mr. Burton, Mr. Koch, are you all ready to proceed?

MR. KOCH: We are.

THE COURT: Ms. Johnson, are you ready to proceed?

MS. JOHNSON: Yes, I am.

THE COURT: All right. We have quite a few matters to deal with today. I've read all your briefs, reviewed some of the case law, and we

don't need to have you all argue everything that's in your briefs. But let me go down and see if I have everything that is scheduled to be heard today.

The Johnsons' motion to withdraw their motion to withdraw specific claims against the plaintiff and third-party defendants; plaintiff's objection to the Johnsons' motion to withdraw their motion to withdraw specific claims of third-party, same objection; plaintiff's motion to exclude expert Lewis Bridges, Jr. and the expert report; third-party defendants' motion to exclude the expert testimony; third-party's motion for a continuance; third-party and the plaintiff's motion for a summary judgment; and Johnsons' motion for summary judgment.

And I think – let's see, there was one other motion. The Johnsons filed a motion seeking an order from the[page 3] court clarifying, quote, who the third-party defendant is. And I know there were some other motions filed today which obviously the court is not going to address today.

So, I suppose we can kind of go down the line and just do each one. We have the Johnsons' motion to withdraw their motion to withdraw specific claims. Ms. Johnson.

MS. JOHNSON: You want me to stand here?

THE COURT: Please. Thank you.

MS. JOHNSON: Good morning, Your Honor. I don't have a lot more to say. What I said in the brief is pretty much all there is to say. And I don't want to waste the court's time, so I'll rest on what I say.

THE COURT: I just have some questions. I have not listened to the tape. Apparently there is a tape that was sent. But there was a transcript of that conversation where apparently you had told the lawyer that you were going to withdraw certain counts in your complaint, and you even prepared I think a motion to withdraw those counts. And then a day or two later you filed a motion to withdraw the motion to withdraw, and you said something about you were intimidated or there was a possibility of intimidation or whatever.

And I guess it's a bit unusual for someone to file a motion and to state to another lawyer or to a lawyer that you were going to withdraw certain counts, and then a day or two later withdraw that or move to withdraw that. And I don't [page 4] quite understand it, frankly.

MS. JOHNSON: The only thing I have to say, Your Honor, is that there is a tape, but there were conversations subsequent to that tape where I was given advice. I was told that -- I was asked to prepare an order, and I said I'm not a lawyer. I can't prepare an order. I don't want to go to jail. And there were other discussions subsequent to that tape that you are not privy to.

So that tape is not the gist of all the conversation that was had with regard to the signed motion that you received. So the things that are on the tape are true, but they don't represent all of the dealings and conversations that went on.

THE COURT: Did these conversations occur subsequent to your taped conversation?

MS. JOHNSON: Yes. And I was told that if I – I don't remember exactly, but I know that I was asked to prepare an order, and I said I'm not a lawyer and I'm not going to get myself in trouble and I ain't preparing no order because I don't want to go to jail. And there was something about all the orders are final. And, you know, I got to hashing it around and my husband and I got to hashing it around, and there were things that happened to the house, outside the house. I became afraid.

THE COURT: What I don't understand, Ms. Johnson -- [page 5] and I'm just trying to talk to you now. But what I don't understand is, is that if – just thinking about it, if you and your husband had decided that you were basically going to withdraw several of your counts, why would the other side be upset with that? It seems to me the other side would be happy with that. So did you just change your mind or what?

MS. JOHNSON: I don't exactly understand.

THE COURT: Well, you had –

MS. JOHNSON: They were happy when we had the first conversation about withdrawing the claims. And then when I had the other conversation about – I don't even remember which it was. They wanted me to draft an order.

THE COURT: Okay.

MS. JOHNSON: And at that point I got scared, because I knew that as a lay person I'm not supposed to draft orders.

THE COURT: Well, I don't understand. You can draft a complaint. I don't know why you can't draft an order. But that's what you thought and that's fine. But that's basically it. Is that the reason you did what you did?

MS. JOHNSON: I didn't understand the ramifications of what I was doing because I was led by the attorney when we spoke, that unless it was an order that we were signing, then it wasn't final.

THE COURT: Okay. Is there anything else you want [page 6] to say about that?

MS. JOHNSON: No, sir.

THE COURT: Okay. Thank you. I'm sorry. I didn't catch your name.

MR. BURTON: David Burton.

THE COURT: Burton. Okay.

MR. BURTON: Just very briefly, Your Honor. I'm here today on behalf of the individual third-party defendants in the matter. I think when we are talking about the motion to withdraw, Mr. Dorsey submitted an affidavit describing the sequence of events that occurred, and I think that clearly lays out what occurred.

The conversation was not a taped conversation. It was a voice mail left on Mr. Dorsey's voice mail that he then recorded to have transcribed for the file.

The affidavit very clearly sets out the conversations that occurred subsequent. And when it came to the issue of whether or not it was an order, Ms. Johnson did tell Mr. Dorsey that she didn't believe she could fill out orders, so the suggestion was then made to prepare a motion. She did so. She submitted it to Mr. Dorsey. He executed it and sent it to the court.

It was not until after the motion executed by all parties involved was filed with the court

that Ms. Johnson made a decision to attempt to renege on her withdrawal.

[page 7]

Now, I think that the case that controls it is the case that's cited in our brief.

THE COURT: I don't want to hear that. If you've cited it, that's fine.

MR. BURTON: All right. Thank you, Your Honor.

THE COURT: Mr. Koch.

MR. KOCH: Judge, Barry Koch for the plaintiff. I had a voice mail message. I had one conversation with Ms. Johnson. She told me that she was sending me a joint motion because it required my consent for her to withdraw her claims. I quite frankly didn't even think that Rule 41 was applicable to the expert, dismissal of actions.

But anyhow, this was all Ms. Johnson's desire to do this and I acceded to her request, and she's the one that drafted the motion and said it was a joint motion. And my point is I have a hard time understanding how one party to a joint motion could withdraw it without the

consent of the other party. That's our position, Your Honor.

THE COURT: Okay. Ms. Johnson, anything else on that particular issue?

MS. JOHNSON: I said earlier that I didn't remember who I spoke to, but I left Williams, Mullen a message and I spoke to Mr. Koch directly. And it was really upon the conversation with him that caused me a problem because he was the one who told me that – and I know I shouldn't be [page 8] listening to him and taking his advice or considering anything he says because he's my adversary. But Mr. Koch said to me, Well, it's your motion and I don't even have to be involved. I really don't have anything to do with it. So whatever you want to do, you can do it. And that's pretty much all.

THE COURT: All right. Thank you.

All right. Mr. Koch, did you file the motion to exclude Lewis Bridges?

MR. KOCH: Yes, Judge. When we received the motion for summary judgment, we for the first time, were provided with the expert report for Mr. Bridges.

THE COURT: You had known about the expert, though?

MR. KOCH: Yes.

THE COURT: Okay. In fact, you knew about that before the deadline, didn't you?

MR. KOCH: Yes. She properly disclosed Lewis Bridges as an expert and identified him as an expert in her expert disclosure that was done in July, early before the date that it was due; that he was going to be called as an engineer to verify that her fence or wall would withstand wind speeds of – in excess of a hundred miles per hour, but she did not provide any report.

The pretrial order that we had required that any report – well, that Rule 26(a) and (b) be followed within the deadlines that were required and no report was provided.

[page 9]

THE COURT: How soon after – it was just what, a week or two that you received the report after the deadline?

MR. KOCH: It's dated the 21st, I think, of August. So it would have been about six days after the deadline for its provision.

THE COURT: The deadline was August the 15th. On July the 30th they disclosed that Lewis Bridges would be the expert. And you are right, it said something about the hundred miles an hour wind. On 8-21 Mr. Bridges completed the expert report. On 8-24 the Johnsons disclosed the expert report to you and to the third-party defendants.

MR. KOCH: Right.

THE COURT: So we are basically talking about nine days?

MR. KOCH: Yes.

THE COURT: What prejudice do you have?

MR. KOCH: Well, I think that you are supposed to comply with the rules.

THE COURT: I know you are.

MR. KOCH: And that's our position. And certainly when it was disclosed back in July, we didn't go out and find any expert to deal with those issues because he was disclosed as an expert for a specific purpose.

THE COURT: Right. But it's now October, middle of October. The trial had been scheduled

for this period of [page 10] time. I think last week it's been continued until what, the early part of December?

MR. KOCH: No. It's November the 28th.

THE COURT: Well, latter part of November.

MR. KOCH: Yes.

THE COURT: So really, I mean, we are talking about nine days. How much prejudice did you really have?

MR. KOCH: I'm not saying a great deal of prejudice, Judge. I just know that if I hadn't complied with the rule, somebody would be there saying my report was not applicable. I was careful to include when we disclosed our expert our surveyor, who may or may not be an expert. But in the abundance of caution, we disclosed him as an expert –

THE COURT: Good idea.

MR. KOCH: -- and then we provided the survey, Judge. I will say in terms of the report itself, event the report, though, in terms of it being utilized to support the motions for

summary judgment and any matters to date, it wasn't submitted under affidavit by Mr. Bridges.

THE COURT: That's a different story. We are talking about Mr. Bridges --

MR. KOCH: Right. I understand.

THE COURT: Okay. Mr. Burton, did you have anything you wanted to say?

MR. BURTON: It's Mr. Stiles' turn to argue the [page 11] expert witnesses.

THE COURT: All right. Mr. Stiles.

MR. STILES: Good afternoon, Your Honor. Alexander Stiles for the third-party defendants. We would join in Mr. Koch's position on the report of Mr. Bridges. We've also filed a motion to exclude the remainder of her experts.

THE COURT: What prejudice do you all have?

MR. STILES: We don't have any reports to this day, Your Honor. We have names and we have letters containing opinions from some of her experts, but we don't even have that from her true position which has been disclosed. I don't believe we have anything from –

THE COURT: I'm talking about Mr. Bridges.

MR. STILES: Oh, yes, sir. I'm sorry.

THE COURT: I'm talking about Mr. Bridges.

MR. STILES: We don't have any prejudice other than it was nine days.

THE COURT: Okay. Ms. Johnson, did you want to respond to that?

MS. JOHNSON: No, sir.

THE COURT: Okay. All right. Who is going to argue the motion for a continuance? You have a hard row to go on that one with what, a 220-person law firm?

MR. BURTON: I think we would rely on the pleadings, Your Honor.

[page 12]

THE COURT: Okay. Well, I can tell you now, if this case were going to be continued, I'm saying if it was going to be continued, it would be continued for other reasons. Certainly not for the reason – and I truly understand that someone is called up to active duty. I truly understand that someone left the law firm. That

person who took over was called up to active duty. But we are not talking about a six-person law firm here. We are talking about a large law firm.

And this is not the most complicated case in the world. And if you all can't handle that case in the time period that you all have, then there is a problem. So I don't think the motion to continue is going to be granted, certainly for that reason.

MR. BURTON: I understand, Your Honor.

THE COURT: Does that leave us with the summary judgment?

MR. KOCH: Yes, Your Honor.

THE COURT: Okay. Who wants to go first?

MR. BURTON: I'll be happy to. I'm going to be very brief, Your Honor, at least try to be, but I think the brief has laid it out extraordinarily well. There is a few points that I want to make.

I think when we look at it, we not only have the plaintiff trying or agreeing to withdraw claims which then creates a situation where

those claims ought to be dismissed, [page 13] but we also have her and her husband in various pleadings and in depositions stating that the only causes of action that they are claiming against these defendants is a 1985 conspiracy and breach of fiduciary duty. And I will start off with those two very quickly.

And when it comes to the criminal conspiracy to interfere with civil rights, Section 1985, the plaintiff has alleged in her complaint and throughout this proceeding that the individual third-party defendants were acting within the scope of their duty at all times, and they were acting as agents of the Property Owners Association. Accordingly, we believe that any claim for conspiracy under Section 1985 is defeated by the intra corporate immunity doctrine.

THE COURT: You can't conspire with yourself.

MR. BURTON: Within yourself, that's correct, Your Honor.

Furthermore, a claim for criminal conspiracy to interfere with Section 1985

requires a showing of discriminatory intent. There has been no showing of discriminatory intent. And, in fact, Mrs. Johnson's husband in interrogatory answers has stated that none of the individual defendants have discriminated against him. And Mrs. Johnson and Mr. Johnson have also admitted that the individual defendants did not selectively enforce the covenants and that they did not discriminatorily enforce the [page 14] covenants. So I believe any showing of discriminatory intent is lacking.

Now, when it comes to the breach of fiduciary duty claim, the Virginia Supreme Court has answered that issue this year, and they have said that if you are going to file a breach of fiduciary duty cause of action, it has to be a derivative action. That's Simmons versus Miller. I think the law is laid out very well in that case, and I think that's the controlling consideration.

THE COURT: This is 42 U.S. Code 3604, I think; is that right?

MR. BURTON: Yes. 3604, that's correct, Your Honor.

THE COURT: Okay.

MR. BURTON: Now, the next thing I would point out is that in order for Ms. Johnson to avoid summary judgment in this case, she needed to submit affidavits supporting her claim. We have none of those. So at this point it's the position of the individual third-party defendants that their facts as supported in a motion for summary judgment have gone unrebutted, and they have to be accepted as the facts of this case.

We believe when you look at the facts in that way, there is no cause of action in any of the specific enumerated counts that Ms. Johnson and Mr. Johnson have filed against Emerald Greens Property Owners Association. [page 15]

I'll rely on the brief for the rest, Your Honor.

THE COURT: Thank you. Mr. Koch.

MR. KOCH: Judge, we of course take the position as the plaintiff, that with regards to all but perhaps the contract claim, even then in terms of the law is all applicable. And the same argument that's been made on behalf of the

third-party defendants is applicable to the Association on all of those claims, that we are identically situated.

As far as our motion for summary judgment with regards to the state court claim enforcement action, I would point out that there really has been no adequate provision of evidence. The Lewis Bridges' report is not supported by an affidavit to the assertions that we put forth in our motion for summary judgment.

There has never been – it looks to me it's completely uncontroverted, that the fence, that is, the wall that's been built, isn't built in accordance with the covenants, and there has been no opposing evidence to that fact. Therefore, Judge, I think we are entitled to summary judgment. And we've covered all of that in our pleadings, except perhaps with regards to the fact that the Bridges' report is not supported by an affidavit.

THE COURT: Thank you. Ms. Johnson.

MS. JOHNSON: I don't know what they said was true or not, and I'm not standing up

here to play lawyer. And I [page 16] believe my case is good enough for you not to have to give me any sympathy. So bear with me a minute.

THE COURT: I'm not giving you any sympathy.

MS. JOHNSON: I'm just asking bear with me for a minute.

THE COURT: Sure.

MS. JOHNSON: The only thing I can call upon, and I don't recall the case law, but I know that I am a pro se litigant and that my pleading standards are not required to be up to those of sophisticated lawyers. And I have no reason to doubt that my pleadings should have been notarized or that Mr. Bridges' report should have been notarized. I did not ask him to do that.

And in the expert witness report, he stated pretty much that he's never testified in a judicial tribunal before, so --

THE COURT: Well, you know, I always -- that happens sometimes. And without getting into any -- making any rulings one way or the other, when a reported expert attempts to be qualified as an expert in my court

and they have never testified before as an expert, and then I say -- after I hear what they have to say, I make a decision, and my decision might be you are qualified as an expert. Then I tell them, okay, you now have been qualified as an expert. So you can say from now on, if you ever go to court again, that you have [page 17] been qualified as an expert.

That doesn't – the fact that someone has never qualified as an expert before doesn't mean that person can't testify as an expert witness is all I'm saying.

MS. JOHNSON: So, in summary, I don't think my pleading standards are required to be up to this arsenal of lawyers we have here, and I know that they are not. And the only thing I'm here about is justice, and that's just for you to decide.

THE COURT: Let me ask you this, Ms. Johnson. With regard to Counts 2 and 3, the 3604, unlawful treatment and unlawful impact under that section, it appears that in your response to the third-party's motion for summary judgment, you claim that you are no

longer pursuing those claims. Is that the case with regard to only the third-party defendants or is that the case with regard to the plaintiffs also?

MS. JOHNSON: The plaintiffs are Emerald Greens, correct?

THE COURT: Correct. Third-party defendants are the individuals.

MR. JOHNSON: The disparate impact is not being pursued because that is extremely statistical; but the disparate treatment with regard to discrimination is definitely intended to be included.

THE COURT: Okay. What about the unlawful [page 18] interference and intimidation under 42 U.S. Code 3617? In your response to their third-party's motion for summary judgment, it appears, based on my reading, that you are no longer pursuing the claims against the third-party defendant – that particular claim against the third-party defendant. Does that apply to the plaintiff also?

MS. JOHNSON: 3617?

THE COURT: Yes, ma'am.

MS. JOHNSON: Your Honor, I think

that that would complicate the case and gets the focus off what it is intended to be about, and it's very complicated. I think it would confuse the jury. And the gravity of it at this point, it's just too much. So in answer to your question, 3617 is out.

THE COURT: Okay. Is there anything else you wanted to say?

MS. JOHNSON: No, sir.

THE COURT: Okay. Thank you. Gentlemen, anything else?

MR. KOCH: Not me, Your Honor.

MR. BURTON: No, Your Honor.

THE COURT: Now, Ms. Johnson, you filed or you and your husband filed a motion for summary judgment against the plaintiffs in this case, but I didn't see any briefing on that. Maybe I'm wrong.

MR. KOCH: Judge, they filed I think a one or [page 19] two-page brief in support of their motion.

MS. JOHNSON: Thank you, Mr. Koch.

THE COURT: Ms. Johnson, were you all

going to pursue your motion for summary judgment?

MS. JOHNSON: Only to the extent that it can go forth on the pleadings. I don't have anything else to say.

THE COUT: Okay. Anyone want to say anything about that?

MR. KOCH: No, Your Honor.

MR. BURTON: It was filed against the plaintiff. We do not have a stake in that action.

THE COURT: You don't want to get yourself in trouble, huh? Okay.

One of the concerns that I have in reviewing all of these briefs and all the paperwork involved – and I think the third-party defendants filed a motion to dismiss two individual members of the Association or the board, I guess, Anne Del Core and David Thompson.

MR. BURTON: That's correct, Your Honor.

THE COURT: Okay.

MR. BURTON: Would you like some argument on that?

THE COURT: Please.

MS. JOHNSON: Your Honor, I've never seen that motion.

MR. BURTON: It's part of our brief in support of [page 20] the motion for summary judgment. It's one of the subsections within that brief.

THE COURT: I wouldn't have made it up. I saw it someplace.

MR. BURTON: The argument simply on the two individual defendants, Your Honor, is that they were not active participants in the decision to pursue the rear corner rule violation. The lawsuit was originally filed in October – or the board voted to file the lawsuit in October.

On October 7, 1998, Del Core and Thompson were not elected to be officers of the Association until October 13, 1999. Therefore, they've had no involvement in the decision to pursue this litigation. They were sued – she countersued and moved the case up. They became party to the lawsuit, but they've taken no action to start the lawsuit or anything along those lines.

And if you look at the facts as laid out in the brief in support of the motion for summary judgment, the minutes reflect when they were brought in. The minutes clearly reflect that there was a decision to continue the litigation on October 13, 1999, but that was before they were elected officers. When that meeting ended, a second meeting began, and that's when they were elected to be officers. So they've had no stake or no decision making in this matter.

THE COURT: All right.

[page 21]

MR. BURTON: And the case that controls is Tillman versus Wheaton-Haven Recreation Association, a Fourth Circuit case.

THE COURT: 1975 case.

MR. BURTON: That's correct.

THE COURT: Okay. Ms. Johnson, you say you never saw the motion, but according to –

MS. JOHNSON: I remember.

THE COURT: -- what I read, you indicated that they were indeed liable because they ratified the board's conduct by voting to authorize legal expenses for fund litigation.

MS. JOHNSON: I have it in my notes here. Your Honor, you forget a lot.

THE COURT: That's okay.

MS. JOHNSON: I didn't – that's okay.

THE COURT: Okay. Well, I don't –

MS. JOHNSON: May I say one thing, Your Honor?

THE COURT: Yes, ma'am. If you will stand at the podium, please, because it's easier for the court reporter and for me to hear.

MS. JOHNSON: With regard to whether they took office at 7:30 or 7:35, we are splitting hairs here, and we had to know for certain about the timing of exactly what happened here.

The only thing I would like to point out is that I [page 22] tried diligently, diligently, begged, pleaded, and there is a host of letters to document this, and these kind attorneys would never make these two people available for deposition. That's all I have to say.

THE COURT: All right. Anything else?

MR. BURTON: Just briefly, Your Honor. I think if you look at – I don't think we are splitting hairs. I think if you look at Exhibit 11

to the third-part defendants' motion for summary judgment, it is a 1999 annual membership meeting. It clearly reflects in there on a motion made and seconded and unanimously carried, the membership agreed to a nonbinding resolution for the Property Owners Association to continue to pursue the legal issue with Lot 15.

That meeting, if you look at it, begins at 7:42. It then ends at the end of all that discussion, and a second meeting beings, which is on Exhibit 12, at 9:14 p.m., and at that time is when Anne Del Core and Mr. Thompson were nominated to fill the roles.

THE COURT: They did not vote.

MR. BURTON: They did not vote.

THE COURT: Right. All right. Based on what I've read in the briefs and based on what I've heard today, it appears that Ms. Del Core and Mr. Thompson didn't vote. They weren't elected to the board until after the vote. And the fact that it's alleged by the Johnsons that, you know, they [page 23] were on the board later on and never affirmatively opposed the continuation

of the litigation has nothing to do with anything, as far as I'm concerned. They simply weren't on the board at the time the vote was had. So Del Core and Thompson are no longer defendants in this case.

All right. Ms. Johnson, you did file a motion, I believe, seeking an order from the court clarifying who the third-party defendant is. Do you remember doing that?

MS. JOHNSON: Yes, sir.

THE COURT: Okay. Do you want to argue that?

MS. JOHNSON: No, sir. I'll just rest on the pleadings.

THE COURT: All right. Anything you would like to say?

MR. BURTON: I have nothing to add to that, Your Honor.

THE COURT: Okay. Do we have any other matters today? I know several motions were just filed when I got back from lunch. There were several motions that were filed which obviously the court is not going to address today.

Mr. Koch, do you have anything else?

MR. KOCH: No, I don't, Your Honor.

THE COURT: Mr. Burton?

MR. BURTON: No, sir.

THE COURT: Ms. Johnson.

[page 24]

MS. JOHNSON: No, sir.

THE COUR: Okay. Thank you. By the way, I will let you know as soon as I possibly can. Obviously, there is a lot here, and I'll try to get to it as soon as I possibly can because I realize that things are moving and we are getting close, but hopefully we'll have something within a very short period of time. Thank you.

(Proceedings adjourned at 2:40 p.m.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

x/s/ Susanne V. Ashx

Susanne V. Ash

xDecember 4, 2001x

Date

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

VERONICA MOODY JOHNSON,
Plaintiff-Appellant,

v.

CITY OF CHESAPEAKE, VIRGINIA, a Municipal corporation, itself; CITY COUNCIL OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; PLANNING COMMISSION OF THE CITY OF CHESAPEAKE, VIRGINIA, in its official capacity; WILLIAM E. WARD; DALTON S. EDGE; JOHN A. COSGROVE; JOHN M. DE TRIQUET; ALAN P. KRASNOFF; DWIGHT M. PARKER; WILLIAM H. PIERCE; DEBBIE RITTER; GENE A. WATERS, In their official capacity as members of the city council of the City of Chesapeake and Personally, in their individual capacities; RODNEY L. FOSTER; CLIFTON D. CABARRAS; EDWARD L. HALL; FRANKIE W. CARROLL; BRYAN L. COLLINS; SANNY S. DAVENPORT; LARRY W. RADFORD; GLADYS A. WILFORE; THOMAS T. WINBORNE, in their official capacity as members of the Planning Commission of the City of Chesapeake, Virginia and Personally, in their individual capacities,

Defendants-Appellees.

NO. 99-2256

Appeal from the United States District Court
For the Eastern District of Virginia, at Norfolk.
Jerome B. Friedman, District Judge
(CA-99-736-2)

Submitted: January 18, 2000

Decided: February 25, 2000

Before WIDENER, TRAXLER, and KING,
Circuit Judges

Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

COUNSEL

Veronica Moody Johnson, Appellant Pro Se, Thomas Jeffrey Salb, BREEDEN, MACMILLAN & GREEN, Norfolk, Virginia, for Appellees.

OPINION

PER CURIAM:

Veronica Moody Johnson sought a special exception permitting her to keep a five-foot high brick wall she built around her home in Chesapeake, Virginia. The local ordinance limited fence heights to four feet. When the Chesapeake Planning Commission and the Chesapeake City Council both denied her

application, Mr. Johnson filed separate, but essentially identical, actions in federal district court and in the Circuit Court of the City of Chesapeake, seeking injunctive relief and damages. The federal district court dismissed, without prejudice, the federal action, citing *Burford* abstention grounds. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 333-36 (1943) (holding that when timely and adequate state court review is available, federal court sitting in equity should abstain from review of cases involving difficult questions of state law or state's administration of its own regulatory schemes.) Ms. Johnson timely appealed. We hold that the dismissal of Ms. Johnson's claims that sounded in equity was proper. However, because a district court may not dismiss, on *Burford* abstention grounds, claims for damages at law, we reverse the dismissal of those claims.

"[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). However, "federal courts may decline to exercise their jurisdiction, in otherwise exceptional circumstances, where denying a federal forum would clearly serve an important countervailing interest." *Id.* (internal quotations and citations omitted). Zoning and land use decisions are fundamentally matters of state law, and Ms. Johnson has a lawsuit pending in state court that virtually duplicates the claims raised in federal court. When it falls within our discretion to do so, we abstain from review of such cases in deference to the state's

complex regulatory scheme for managing land use. See *Pomponio v. Fauquier County Bd. of Supervisors*, 21 F.3d 1319, 1327 (4th Cir. 1994) ("[W]e believe that in the usual case federal courts should not leave their indelible print on local and state land use and zoning law by entertaining these cases and, in effect, sitting as a zoning board of appeals;[.]"). Thus, to the extent that Ms. Johnson's complaint demanded equitable relief, the district court properly dismissed those demands.

On the other hand, the Supreme Court has held that a district court may not dismiss, under *Burford* abstention, claims for monetary damages at law, noting that, "[W]e have permitted federal courts applying abstention principles in damages actions to enter a stay, but we have not permitted them to dismiss the action altogether." *Quackenbush*, 517 U.S. at 730; see also *Johnson v. Collins Entertainment Co., Inc.*, 199 F.3d 710, 727 (4th Cir. 1999) (noting that "the (Supreme) Court held (in *Quackenbush*) that *Burford* can support only a stay, and not the outright dismissal or remand, of a damages action"). Thus, a district court may not on *Burford* abstention grounds, relinquish jurisdiction over claims for damages at law, and consistent with *Quackenbush*, we reverse the district court's dismissal of Ms. Johnson's damages claims at law. In so reversing, we note that the Sixth Circuit's recent decision in *MacDonald v. Village of Northport*, Michigan, 164 F.3d 964, 970 (6th Cir. 1999), which permitted the complete dismissal of a complain demanding monetary relief, is not to

the contrary. First, insofar as the *MacDonald* court held that "the *Burford* abstention doctrine and the Eleventh Amendment created 'grounds together' to dismiss" the case in its entirety, id, at 973, it is unclear which basis justified the dismissal of the claims for money damages. However, the *MacDonald* court implied that dismissal of the damages claims was not justified on *Burford* grounds, noting that "The Fourth Circuit has recognized that *Quackenbush* overruled *Pomponio* to the extent that *Pomponio* permitted a district court to dismiss an action for damages rather than enter a stay to await the conclusion of state proceedings." MacDonald, 164 F.3d at 969 n.4. Second, while one of the counts in the MacDonald complaint did seek monetary relief, the monetary relief sought was in the nature of restitution. "Because restitution is an equitable remedy, ef . *Maryland Dept. of Human Resources v. United States Dept. of Agriculture*, 976 F.2d 1462, 1482 (4th Cir. 1992) (noting that "equitable nature of restitution"), dismissal of that equitable claim could have been proper on *Burford* grounds. Finally, to the extent that the demand for monetary damages did constitute a claim at law, the Sixth Circuit relied upon the Eleventh Amendment to permit dismissal of the complaint, that the Eleventh Amendment could have been the sole justification for the dismissal of those demands for monetary damages at law. *Count II alleged that the Village had 'taken' the MacDonalds' property without just compensation, and that the MacDonalds were damaged, by the loss of quiet enjoyment of their

property and by the diminution of its value, in an amount over $50,000." *MacDonald*, 164 F.3d at 967.

Therefore, we affirm the dismissal of the claims in equity and reverse the dismissal of the damages claims. We deny Ms. Johnson's motion for oral argument and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

CASE BACKGROUND

Plaintiff's homeowners association, Emerald Greens Property Owners' Association (the "EGPOA") attempted to rescind an architectural approval to build a fence which had been given in writing over 1 ½ years after the fact when plaintiff had already commenced costly construction in reliance thereupon. The covenants, however, has no provision beyond 30 days for any disapproval. (See Exhibit 31, Plea in Equity Covenants at Book 2510, Page 609).

[This neighborhood consists of 149-single family houses that range from $400,000 to over $1,000,000. The owners are lawyers, doctors, business owners who are very powerful in the local and statewide political process who command politicians to listen when they speak. The Blacks who have moved into the neighborhood in record numbers in recent years have tended to take extreme pride in the presentation of their properties, in that, statistically, some Blacks have had to leap higher hurdles to arrive such a point and there are still those Caucasians who have a difficult time accepting this, like the EGPOA president whose remarks of "Y'all sure do keep the pressure on" and "You won't pull that jury thing on us; we'll have this fence down in 30 days" comment clearly demonstrates racist attitudes and jealousy over the fact that this fence has raised the standard for fences in the neighborhood (Exhibit 13) and increased property values and it belongs to a Black person.

The detrimental effect necessary for a denial here does not exist.]

Plaintiff did not secure a building permit in that a 5-foot brick fence is exempt from the USBC in Chesapeake as there is nothing in the United States Building Code manual which addresses a brick fence. The exempt status of the fence is corroborated by the assistant city attorney's conveyance of her understanding at page 23, line 10 of the February 24, 1999 transcripted proceeding (Exhibit 2). As a direct result of the EGPOA's approval of plaintiff's fence, it was constructed one foot above the four foot planned height for a side yard on a corner lot and plaintiff therefore had to seek a special exception to fence height for a corner lot which is allowed by the City Zoning Ordinance. (See App.VI pursuant to 14-201(B)) And such special exceptions have been freely granted to every Caucasian applicant who went through the process in 1996, 1997 and 1998, but not to plaintiff, who is Black, even thought plaintiff's fence is 95% see through wrought iron and only one foot above the code in one 8-foot section which view is buffered from the rear neighbor by his 25-foot tree. (See Exhibits 14, 15, 16 & 17). Plaintiff's homeowners association (the EGPOA) sued her to tear down her fence despite the fact that they (the EGPOA) misled plaintiff to her detriment by approving the fence in this location, which would cost $22,000 to relocate. Addendum XIV.

Plaintiff duly made proper application for the special exception and was arbitrarily and capriciously denied (See Addendum III) twice by

the Planning Commission and at the appeal to the City Council due to pressures from the Emerald Greens Property Owners' Association who needed desperately to have this special exception denied and get the City to make plaintiff tear down her fence because the frivolous and malicious lawsuit they (the EGPOA) had filed against plaintiff had major problems.

Their problems were/are:

1. They have no damages; plaintiff presented unrefuted probative evidence (Exhibits 8, 9 and 13)
2. They have unclean hands.
3. They are seeking equity but they have not done equity.
4. Equity will not abolish a contract.
5. Petitioner acted in reliance.
6. They waithed 18 months to act (the contract gave them 30 days), etc.

The EGPOA had a vested interested in having plaintiff's special exception denied.

The Planning Commission Background report sited no objections to this special exception and plaintiff met every statutory requirement for approval. (See Addendum VI), but was yet arbitrarily and capriciously denied solely because of her color in that every neighbor who spoke against plaintiff's fence was Caucasian, every neighbor who supported the special exception was Black and the Board of Directors of the homeowners' association is all Caucasian, and all Caucasian people who applied in 1996, 1997 and 1998 were approved for special exceptions (Exhibit 7). The Board of

Directors tried to cover up their racist deeds by "electing" a Black man, Joe Washington, to the Board of Directors by proxies a few weeks before they voted to sue plaintiff to tear down her fence and they (the EGPOA Board) also made him head of the architectural committee briefly prior to this even though he was new to the neighborhood from New York and was unfamiliar with the neighborhood or its standards.

In further support of their discriminatory acts, after going through the motions and "voting" in a Black by proxy (I was present at the meeting) just before they (the EGPOA) sued this Black plaintiff to tear down her fence, and after having recently make him architectural director, page 67, line 1, Addendum XV. (Sworn deposition of Mike Lewis, president of the EGPOA). The president of the EGPOA said "Well, when Joe took over, I kept the file on the Johnson's property. I didn't give that to him."

In further racist fashion, the EGPOA was "fortunate" enough to have the former law partner of one of the recent former board members of the EGPOA, Greg Larsen, who is Caucasian and is an acknowledged enemy of the plaintiff, who has acted during the term of this controversy sitting as judge. (Chief Judge Thomas V. Forehand) in the matter of *EGPOA v. Johnson* (Judge Forehand is Caucasian.)

This judge also owns real estate with this same former board member and friend. He stated that he knew Greg Larsen, his business partner, lived in the neighborhood but did not

recuse himself. (See transcript App. XVI, page 5, line 6).

Plaintiff has managed to subsequently have him (Chief Judge Forehand) recuse himself but only after he made a crucial ruling setting a trial on the merits in the case of the *EGPOA v. Johnson*, ignoring plaintiff's Plea in Equity of Laches, detrimental reliance and breach of contract and her demand for a jury trial upon said Plea in Equity pursuant to 8.01-336(D) of the Code of Virginia, which is a statutory right and the chancellor had no discretion to deny the jury trial. *Standardsville Volunteer Fire Co. v. Berry*, 229, Va. 578, 331 S.E.2d 466 (1985). See Exhibit 24 and App. XVII. I

After Chief Judge Forehand overruled plaintiff's exception to praecipe, ignoring plaintiff's demand for a jury trial upon the Plea in Equity and after he was recused, no other judge will sign a lawful decree setting forth the legal status of plaintiff's jury trial upon her Plea in Equity so that she can file an interlocutory appeal for the deprivation of her statutory and constitutional right to a jury trial upon her Plea in Equity as has been properly demanded.

To this day, almost a year has passed and no judge in Chesapeake has signed the lawful decree denying it so that plaintiff can go forth for an interlocutory appeal which has already been noticed pending the entry of a decree upon plaintiff's demand for a jury trial upon a Plea in Equity. [Is this obstruction or justice?]

Your plaintiff's only point here is to establish a basis for her position that she cannot have a fair and impartial trial in any matter in

the City of Chesapeake and that this court would be just to intervene in that it is the lawful purpose of this court to intervene when there appears that the likelihood of a timely, fair and impartial trial does not exist for the plaintiff in state court in order to have her constitutional claims fairly and impartially adjudicated.

I pray that his Honorable Court will exercise its jurisdiction to that end.